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U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20529

U.S. Citizenship and Immigration Services

B6

[redacted]

FILE: WAC-03-106-53981 Office: CALIFORNIA SERVICE CENTER Date: DEC 30 2004

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a health care services firm. It seeks to employ the beneficiary permanently in the United States as a registered nurse. The petitioner asserts that the beneficiary qualifies for certification pursuant to 20 C.F.R. § 656.10, Schedule A, Group I. The petitioner submitted the Application for Alien Employment Certification (ETA 750) with the Immigrant Petition for Alien Worker (I-140).

The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition, as well as to pay the beneficiaries of other approved I-140 petitions filed by the petitioner, and denied the petition accordingly.

On appeal, counsel states that the evidence establishes that each additional employee generates additional profits for the petitioner and thereby establishes the petitioner's ability to pay the proffered wage.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions.

The regulation at 8 C.F.R. § 204.5(g)(2) states:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

Employment-based petitions depend on priority dates. The priority date for Schedule A occupations is established when the I-140 is properly filed with CIS. 8 C.F.R § 204.5(d). The petition must be accompanied by the documents required by the particular section of the regulations under which it is submitted. 8 C.F.R. § 103.2(b)(1). The priority date of the petition in this case is February 18, 2003.

The proffered wage as stated on the Form ETA 750 is $25.00 per hour, which amounts to $52,000.00 annually. On the Form ETA 750B, signed by the beneficiary on December 24, 2002, the beneficiary did not claim to have worked for the petitioner.

On the petition, the petitioner claimed to have been established in 1990, to have a gross annual income of $2.1 million, to have net annual income of $500,000, and to currently have 140 employees.

In support of the petition, the petitioner submitted the following: a copy of the petitioner's articles of incorporation dated January 29, 1993; a copy of the petitioner's business license issued on July 1, 2000 by the City of Milpitas, California; a copy of the petitioner's business certificate issued on March 31, 2001 by the

City of San Jose, California; a copy of a brochure describing the petitioner's business; a Declaration Regarding Financial Capacity dated February 3, 2003 and signed by the petitioner's managing director; a job announcement for the offered position with a certificate of posting dated February 3, 2003 signed by the petitioner's managing director; a copy of the beneficiary's professional license card as a registered nurse issued by the Philippines Professional Regulation Commission, with date of registration of February 15, 1993; a copy of the beneficiary's Registered Nurse license issued on February 15, 1993 by the Philippines Professional Regulation Commission; a copy of the beneficiary's nurse registration certificate dated June 14, 2001 issued by the United Kingdom Central Council for Nursing, Midwifery and Health Visiting, with an attached copy of a transmittal letter showing the beneficiary's PIN card for that registration; a copy of the beneficiary's certificate issued on August 7, 2002 by the Commission on Graduates of Foreign Nursing Schools (CGFNS); a copy of the beneficiary's diploma showing a degree of Bachelor of Science in Nursing granted on March 19, 1992 by the Pines City Educational Center, College of Nursing, Baguio City, Philippines, with accompanying course transcript; a copy of a letter dated December 17, 2002 from the nursing home manager at Peacock Medicare Limited confirming the beneficiary's employment as a nurse from December 2000 to the date of the letter; copies of training certificates issued to beneficiary for nurse training courses in the United Kingdom in 1994, 1996, 1999 and 2001; and a copy of a letter dated August 15, 2000 signed by the chief nurse at Lutheran Hospital, [redacted] confirming the beneficiary's employment with that hospital from May 1995 to June 2000.

The director found the evidence submitted to be insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Therefore, in a request for evidence (RFE) dated June 25, 2003, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date.

In response, counsel submitted a letter dated July 1, 2003 accompanied by the following documents: a copy of the petitioner's Form 1120 U.S. Corporation Income Tax Return for 2002; a copy of the petitioner's Form 100 California Franchise or Income Tax Return for 2002; and a copy of the petitioner's Form DE 6 California [redacted] for the first quarter of 2003.

In a decision dated September 2, 2003, the director noted that CIS records indicated that three other I-140 petitions filed by the petitioner in the same year as the instant petition had already been approved. The director found that the petitioner's financial resources were sufficient to pay the proffered wages to the beneficiaries of the previously-approved petitions, but that the evidence did not establish the petitioner's ability to pay additional employees. The director therefore denied the petition.

On appeal, counsel submits a brief and the following additional evidence: a letter dated September 24, 2003 from a certified public accountant explaining the petitioner's cash and accrual accounting methods; a balance sheet for the petitioner dated January 31, 2003, prepared on an accrual basis; an additional copy of the petitioner's articles of incorporation; a copy of a Statement by Domestic Stock Corporation of the petitioner, with no signature or date of submission visible; a list of real properties co-owned by the petitioner's managing director with purchase dates from 1994 through 2003, along with copies of property deeds for four of the properties; a copy of a home equity approval notification in the amount of $321,000.00 in the name of the petitioner's managing director and her husband; an additional copy of the petitioner's Form DE 6 Quarterly Wage and Withholding Report for the first quarter of 2003; copies of the petitioner's Form DE 6 quarterly wage and withholding reports for the last quarter of 2002 and the second quarter of 2003; copies of sample records from 2002 and 2003 of the petitioner for twelve payroll periods showing for each record a time sheet, a payroll register, the petitioner's invoice to a

hospital, and the check payment made by the hospital; copies of contracts between the petitioner and the United States Department of Veterans' Affairs, Palo Alto Health Care System, of Palo Alto, California, the government of San Mateo County, California, the government of Santa Clara County, California, the San Jose Medical Center, of San Jose, California, Alameda Hospital, of an unidentified location; O'Connor Hospital, of San Jose, California, and [redacted] a Delaware Corporation with an office in Oakbrook Terrace, Illinois; a copy of a transmittal memorandum for a card relating to a line of credit of the petitioner in the amount of $100,000.00 at Wells Fargo Bank; a partial copy of a commercial loan statement dated September 1, 2003 showing a total line of credit amount of $100,000.00 with an institution identified only in counsel's brief as the Washington Mutual Bank, with the information on the petitioner's current loan balance omitted; and copies of financial statements of the petitioner for the period February through June 2003.

In his brief, counsel states that the evidence demonstrates that the petitioner's profits increase with each additional employee, because the amounts billed by the petitioner to its client health care facilities are significantly greater that the wages paid by the petitioner to its nurse employees. Counsel therefore states that the evidence establishes the petitioner's ability to pay the proffered wage to the beneficiary.

The AAO will first evaluate the decision of the director, based on the evidence submitted prior to the director's decision. The evidence submitted for the first time on appeal will then be considered.

The I-140 petition states in Part 5 that the petitioner has 140 employees. The regulation at 8 C.F.R. § 204.5(g)(2), quoted in full above, states that "where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage." The evidence includes a Declaration Regarding Financial Capacity dated February 3, 2003 and signed by the petitioner's managing director. But nothing in the record indicates that the managing director is a financial officer of the petitioner. No statement from a financial officer of the petitioner was submitted for the record.

In determining the petitioner's ability to pay the proffered wage, CIS will also examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the instant case, however, the ETA 750B signed by the beneficiary did not state any work experience with the petitioner. The record contains no evidence that the beneficiary has been employed by the petitioner.

As another means of determining the petitioner's ability to pay the proffered wage, CIS will examine the petitioner's net income figure as reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Tex. 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd.*, 703 F.2d 571 (7th Cir. 1983). In *K.C.P. Food Co., Inc.*, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *See Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

For a corporation, CIS considers net income to be the figure shown on line 28, taxable income before net operating loss deduction and special deductions, of the Form 1120 U.S. Corporation Income Tax Return. The petitioner's tax return for 2002 covers its tax year of February 1, 2002 until January 31, 2003. That return shows the amount for taxable income on line 28 as $183,708.00. That amount is greater than the proffered wage of $52,000.00.

As an alternative means of evaluating the petitioner's ability to pay the proffered wages, CIS may also review the petitioner's net current assets. Net current assets are a corporate taxpayer's current assets less its current liabilities. Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. A corporation's current assets are shown on Schedule L, lines 1 through 6. Its current liabilities are shown on lines 16 through 18. If a corporation's net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The net current assets are expected to be converted to cash as the proffered wage becomes due. Thus, the difference between current assets and current liabilities is the net current assets figure, which if greater than the proffered wage, evidences the petitioner's ability to pay.

Concerning the instant petition, calculations based on the Schedule L attached to the petitioner's tax return for 2002 yield the figures for net current assets of -$132,318.00 for the beginning of its 2002 tax year (February 1, 2002) and -$7,465.00 for net current assets for the end of its 2002 tax year (January 31, 2003). Since those figures are negative, they provide no further evidence in support of the petitioner's ability to pay the proffered wage.

The record before the director closed with the submission of the petitioner's response to the RFE. That evidence was received by CIS on July 3, 2003. At that time, the petitioner's 2002 return was its most recent return available. Therefore, if the instant petition were the only one filed by the petitioner, the petitioner's taxable income of $183,708.00 on line 28 of its 2002 return would be sufficient to establish its ability to pay the proffered wage during the relevant period. However, CIS records indicate that the petitioner has filed multiple I-140 petitions since 1998.

CIS records indicate that the numbers of I-140 petitions filed by the petitioner each year since 1998 are as follows: one in 1998, one in 1999, one in 2000, seven in 2001, thirty-one in 2002, seventeen in 2003 (including the instant petition), and two in 2004. The ten petitions filed from 1998 to 2001 were all approved. Of the thirty-one petitions filed in 2002, fifteen were approved; of the seventeen filed in 2003, six were approved; and of the two filed in 2004, neither one has been approved. Of the petitions which have not been approved, two are still pending the director's decision and the rest were either denied or had prior approvals revoked. For some of the denied petitions, appeals are now pending with the AAO.

Where a petitioner has filed petitions for multiple beneficiaries, it is the petitioner's burden to establish its ability to pay the proffered wage to each of the potential beneficiaries. In the instant petition, although the evidence indicates financial resources of the petitioner greater than the beneficiary's proffered wage, the evidence does not contain information about the multiple I-140 petitions filed by the petitioner. Specifically, the record in the instant case lacks information about wages paid to other potential beneficiaries of I-140 petitions filed by the petitioner, about the priority dates of those petitions, and about the present employment status of those other potential beneficiaries.

The record before the director included a copy of the petitioner's Form DE 6 California Quarterly Wage and Withholding Report for the first quarter of 2003. That reports shows payment of wages to the petitioner's employees in the amount of $614,132.48 for that quarter. The total number of employee names on the report

is 92. The report shows monthly totals of employees as of the 12th of each month as follows: 62 employees in the first month of the quarter (January 2003), 67 employees in the second month of the quarter (February 2003), and 72 employees in the third month of the quarter (March 2003). The differences between the total number of employee names on the report and the monthly totals on the report indicates significant turnover in the petitioner's workforce during the first quarter of 2003.

The amount of total employee compensation shown on the DE 6 report for the first quarter of 2003 appears to be consistent with the petitioner's other financial evidence. But the numbers of monthly employees shown on the DE 6 report is not consistent with the petitioner's claim on the I-140 petition filed in February 2003 that the petitioner then had 140 employees. That figure is more than double the number of employees shown for January 2003 on the DE 6 report, which was 62, and more than double the number of employees shown for February 2003 on that report, which was 67.

The Board of Immigration Appeals, in *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988), has stated, "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice." The record contains no explanation for the inconsistencies in the evidence concerning the number of the petitioner's employees.

For the foregoing reasons, the evidence submitted prior to the director's decision fails to establish the ability of the petitioner to pay the proffered wage to the beneficiary of the instant petition.

In his decision, the director correctly stated the petitioner's taxable income before net operating loss and special deduction on its 2002 return as $183,708.00. The director correctly stated the figure of $7,465.00 as the petitioner's net current liabilities for 2002, which is equivalent to the figure for net current assets of -$7,465.00 for the end of the petitioner's 2002 tax year, as discussed above.

The director noted that CIS records indicated that three other I-140 petitions filed by the petitioner in the same year as the instant petition had already been approved. The director found that the petitioner's financial resources were sufficient to pay the proffered wages to the three beneficiaries of the previously-approved petitions, but found that the evidence did not establish the petitioner's ability to pay additional employees. No information on the proffered wages paid to those three beneficiaries appears in the record in the instant case, nor does the director's decision state what figures the director used in concluding that the evidence in the instant case established the petitioner's ability to pay the proffered wages to those three beneficiaries. Presumably, the director had access to the files containing those other petitions when he analyzed the evidence in the instant petition.

Although the record in the instant petition does not show the basis for the director's calculations pertaining to the proffered wages for beneficiaries of other petitions filed by the petitioner, the director's decision to deny the instant petition was correct. Although the director referred to only three other petitions submitted by the petitioner, in fact, as discussed above, the petitioner has filed numerous I-140 petitions, including seventeen petitions filed in 2003, the year in which the priority date was established. In the instant petition, the petitioner did not submit evidence to show its ability to pay the beneficiaries of other approved and pending petitions while also paying the proffered wage to the beneficiary in the instant petition. The director's decision to deny the petition was therefore correct, based on the evidence submitted prior to the director's decision.

On appeal, the petitioner submits a brief and additional evidence. The petitioner makes no claim that the newly-submitted evidence was unavailable previously, nor is any explanation offered for the failure to submit this evidence prior to the decision of the director.

The question of evidence submitted for the first time on appeal is discussed in *Matter of Soriano*, 19 I & N Dec. 764 (BIA 1988), where the BIA stated:

> Where . . . the petitioner was put on notice of the required evidence and given a reasonable opportunity to provide it for the record before the denial, we will not consider evidence submitted on appeal for any purpose. Rather, we will adjudicate the appeal based on the record of proceedings before the district or Regional Service Center director.

In the instant case, the evidence submitted on appeal relates to the petitioner's ability to pay the proffered wage. The petitioner was put on notice of the need for evidence on this issue by the regulation at 8 C.F.R. § 204.5(g)(2), which is quoted on page two above. In addition to the regulation, the petitioner was put on notice of the types of evidence needed to establish its ability to pay the proffered wage by published decisions of the AAO and its predecessor agencies. Moreover, in the instant case, the petitioner was put on notice by the RFE issued by the director of the need for evidence relevant to the petitioner's ability to pay the proffered wage. For the foregoing reasons, the evidence submitted for the first time on appeal is precluded from consideration by *Matter of Soriano*, 19 I & N Dec. 764.

Nonetheless, even if the evidence submitted for the first time on appeal were properly before the AAO, it would fail to overcome the decision of the director. The petitioner's evidence submitted on appeal includes a letter dated September 24, 2003 from a certified public accountant explaining the petitioner's cash and accrual accounting methods and purposes. That letter states that the petitioner uses a cash basis in its tax returns, because the petitioner is a service company. Companies which sell products and therefore have inventories are required to file taxes on an accrual basis, according to the letter. The letter states that for internal purposes the petitioner maintains its accounting records on an accrual basis, a method which generally presents a more stable picture of a company's financial situation from year to year, according to the letter.

Also submitted on appeal is a balance sheet for the petitioner as of January 31, 2003, prepared on an accrual basis. Although the balance sheet appears immediately below the accountant's letter in the exhibits submitted on appeal, the accountant's letter speaks in only general terms about the accounting methods followed by the petitioner, and makes no reference to the balance sheet for January 31, 2003. The balance sheet therefore appears to be an unaudited financial statement. Similarly, the petitioner's other financial statements submitted on appeal, namely a profit and loss statement for the period February through June 2003, and a summary balance sheet dated June 30, 2003, bear no indications that they are audited financial statements.

Unaudited financial statements are not persuasive evidence. According to the plain language of 8 C.F.R. § 204.5(g)(2), where the petitioner relies on financial statements as evidence of a petitioner's financial condition and ability to pay the proffered wage, those statements must be audited. Unaudited statements are the unsupported representations of management. The unsupported representations of management are not persuasive evidence of a petitioner's ability to pay the proffered wage.

The evidence newly submitted on appeal includes copies of contracts between the petitioner and the United States Department of Veterans' Affairs [redacted]alifornia, the government of San Mateo County, California, the government of Santa Clara County, California, the San Jose [redacted]of an unidentified locatio[redacted]

of San Jose, California, and InteliStaff Healthcare, Inc., a Delaware Corporation with an office in Oakbrook Terrace, Illinois;

None of the contracts obligate any health care facility to request any minimum amount of nursing services from the petitioner, nor do they obligate the petitioner to fulfill all requests. For example, the contract between the petitioner and the Veteran's Administration states, "This is an indefinite-quantity contract for the supplies or services specified in the [attached] Schedule," and further states, "The quantities of supplies and services specified in the Schedule are estimates only and are not purchased by this contract." (Contract with the Veterans' Administration, August 23, 2000, extended by Change Order 3, April 1, 2003, page 78). Similarly, the contract with th[redacted]mmits the petitioner to supply registered nurses "upon request" by that health care facility, but with the proviso that the petitioner's obligation to do so is "subject to the availability of qualified nurses." (Agreement with San Jose Medical Center, June 24, 2001, section 2).

Also newly submitted on appeal are copies of sample records from 2002 and 2003 of the petitioner for twelve payroll periods, showing for each record a time sheet, a payroll register, the petitioner's invoice to a hospital, and the check payment made by the hospital; copies of daily summary reports for May 6, 7, and 13, 2003 from the [redacted] showing invoice payments to the petitioner; a deposit summary for an account at the Bank of the West showing a deposit on June 4, 2003; and a copy of a credit memo from an unidentified institution recording a check payment on June 4, 2003 to the petitioner. The documents from Pearce Financial [redacted] and the unidentified institution apparently relate to the sample payroll records, though it is unclear to which specific payroll records those documents relate.

The payroll records submitted on appeal provide detailed information on the manner in which the petitioner conducts its business, and they are persuasive evidence that the petitioner earns significant income for each of its employees who are placed in health care facilities pursuant to one of the contracts with the petitioner. Nonetheless, the record lacks evidence sufficient to establish that each of the potential beneficiaries of the petitions filed by the petitioner would be likely to find full-time placement at health care facilities if employed by the petitioner. The petitioner's evidence fails to address the issue of competition among nurse staffing agencies. None of the petitioner's contracts submitted in evidence restrict the contracting health care facilities from seeking nurse staffing assistance from agencies other than the petitioner.

The evidence newly submitted on appeal also includes copies of the petitioner's DE 6 California wage and withholding reports for the fourth quarter of 2002 and for the second quarter of 2003. Those reports do not differ significantly from the petitioner's DE 6 report for the first quarter of 2003, which was submitted prior to the director's decision. As discussed above, the petitioner's claim on its I-140 petition submitted in February 2003 to have 140 employees is inconsistent with the information in the DE 6 report for the first quarter of 2003, which was submitted previously. The DE 6 reports newly submitted on appeal raise similar inconsistencies.

The petitioner's DE 6 report for the last quarter of 2002 shows compensation to employees in the amount of $477,618.65. The total number of employee names on that report is 61, and the report shows total employees as of the 12th of each month as 42 employees in the first month of the quarter (October 2002), 48 employees in the second month of the quarter (November 2002), and 45 in the third month of the quarter (December 2002). The petitioner's DE 6 report for the second quarter of 2003 shows compensation to employees in the amount of $777,876.04. The total number of employee names on that report is 95, and the report shows total employees as of the 12th of each month as 71 employees in the first month of the quarter (July 2003), 76 employees in the second month of the quarter (August 2003) and 72 employees in the third month of the

quarter (September 2003). Like the report submitted previously, the DE 6 reports submitted for the first time on appeal indicate significant employee turnover for the quarters reported.

The evidence submitted on appeal contains no explanation for the inconsistencies in the petitioner's evidence concerning the number of its employees. *See Matter of Ho*, 19 I&N Dec. at 591-592.

The evidence submitted on appeal also includes a list of real properties co-owned by the petitioner's managing director with purchase dates from 1994 through 2003, with corresponding property deeds and title insurance documents. One of the deeds refers to the co-owners as husband and wife. Counsel's brief identifies the managing director and her co-owner as the "sole stockholders" of the petitioner. (Brief, page 3). But counsel's assertion on this point is not supported by any documentary evidence in the record. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Counsel states that the relevance of the property deeds of the petitioner's stockholders is to show their ability to repay loans to shareholders, shown on the balance sheet of the petitioner's tax return for 2002. Counsel asserts that since the stockholders had sufficient assets, they could have repaid the loans at any time, and that therefore those loans should be considered as current assets of the corporation. However, it is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. *See Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Consequently, assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage.

Notwithstanding the extensive documentation submitted on appeal, the evidence in the record lacks any audited financial statements and lacks any information concerning the prospective new employees of the petitioner as a result of its approved and pending I-140 petitions.

Counsel asserts that many beneficiaries of I-140 petitions who are still in their home countries do not necessarily seek immigrant visas based on those approved I-140 petitions because they may be the beneficiaries of multiple petitions from different petitioners. Moreover, even after beginning employment, many such beneficiaries may accept offers from other employers and leave the employment of the petitioner who had filed the I-140 petition on their behalf. Counsel cites the portability provision of the American Competitiveness Act for the 21st Century to note that an alien who has had an adjustment of status petition pending for more than six months is permitted to switch employers and still adjust status based on a previously-approved petition submitted by the alien's earlier employer.

As noted above, the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. at 534; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506. Some support for counsel's assertions may be found by comparing the DE 6 forms in the record with CIS records showing the names of beneficiaries of approved petitions submitted by the petitioner. Less than half of those beneficiaries' names appear on the three quarterly DE 6 reports listing the employees of the petitioner. But, aside from counsel's statements in his brief, the record lacks any explanation of why many beneficiaries of the petitioner's approved petitions did not work for the petitioner during the fourth quarter of 2002 or the first two quarters of 2003. CIS may not assume that the beneficiaries of approved petitions will not seek immigrant visas based on those approved petitions.

Even if counsel's assertions about the general nature of the employment-based immigrant visa process were assumed to be true, the record in the instant case would still lack evidence to show that the specific beneficiaries of the multiple I-140 petitions filed by the petitioner have failed to seek immigrant visas based on approved petitions or for other reasons are no longer expected to be in the employ of the petitioner. Nor does the record in

the instant petition contain any information about the proffered wages for the beneficiaries of other petitions filed by the petitioner. Therefore the record fails to establish the petitioner's ability to pay the additional employees on whose behalf it has filed petitions, while also paying the proffered wage to the beneficiary.

For the foregoing reasons, the evidence submitted on appeal would fail to overcome the decision of the director, even if that evidence were properly before the AAO on appeal.

Beyond the decision of the director, the Form ETA 750, item number 7, for the address where the beneficiary will work, states the same address as the petitioner's own address shown in item 6 of the Form ETA 750. But such a work location is inconsistent with the copies in the record of the petitioner's contracts with governmental and private organizations, which indicate that the beneficiary will be placed in one or more health care facilities.

The beneficiary's possible work locations indicated by the petitioner's contracts also are evidence that the posting of the notice of job availability did not conform to the regulatory requirements under 20 C.F.R. § 656.20. Under the regulations, the notice must be posted at the "facility or location of the employment." 20 C.F.R. § 656.20(g)(1). *Cf.* 20 C.F.R. § 656.20(g)(3), (8).

In the instant case, the posting certificate signed by the managing director indicates that the job announcement for the offered position was posted at the petitioner's administrative offices. But by merely posting the notice at its administrative offices, the petitioner has not complied with the regulatory notice requirements. The purpose of requiring the employer to post notice of the job opportunity is to provide U.S. workers with a meaningful opportunity to compete for the job and to assure that the wages and working conditions of United States workers similarly employed will not be adversely affected by the employment of aliens in Schedule A occupations. *See* Immigration Act of 1990, Pub.L. No. 101-649, 122(b)(1), 1990 Stat. 358 (1990); *see also* Labor Certification Process for the Permanent Employment of Aliens in the United States and Implementation of the Immigration Act of 1990, 56 Fed. Reg. 32,244 (July 15, 1991). The petitioner further failed to indicate whether it provided notice to the appropriate bargaining representative(s).

The certificate of posting signed by the petitioner's managing director is dated February 3, 2003, but that date is prior to the completion of the purported posting period, which is stated as February 3, 2003 to February 14, 2003. The record contains no explanation for this inconsistency.

Concerning the notice of job availability, the record lacks evidence sufficient to establish that the notice complies with 20 C.F.R. § 656.20(g)(8), since the petitioner has not submitted evidence that it is offering a prevailing wage rate for each of the geographic locations where the proffered position would be performed. Although several of the contracts in the record are for nurse staffing services at specific hospitals, the contract with [redacted] an office i[redacted]llinois, does not limit the potential work location to any specific hospital. Moreover, one contract is with Alameda Hospital, but the location of that hospital is not stated in that contract or elsewhere in the record.

Furthermore, the information on the notice of job availability is inconsistent with information on the ETA 750. The regulation at 20 C.F.R. § 656.20(g)(8) states the following: "If an application is filed under the Schedule A procedures at Sec. 656.22 of this part, the notice shall contain a description of the job and rate of pay, and the requirements of paragraphs (g)(3) (ii) and (iii) of this section." The notice of job availability states the rate of pay as $1000.00 per week. In stating a weekly salary, with no indication of the number of hours per week, the notice leaves uncertain the hourly wage. The copies of the petitioner's contracts with medical facilities indicate that many variations in shifts and hours are possible for nurses employed by the

petitioner. The Form ETA 750 states the proffered wage as $25.00 per hour. Because the notice of job availability fails to state the hours to be worked and because it states payment by the week rather than by the hour, the notice of job availability is inconsistent with the Form ETA 750 concerning the proffered wage. The petitioner has the responsibility to explain evidentiary inconsistencies in the record, but the petitioner's evidence in the instant case fails to explain the foregoing inconsistency. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

Another issue raised by the evidence concerns whether the petitioner's offer of employment to the beneficiary is for full-time work, or for temporary work on an as-needed basis. The narrative description of the petitioner's business in the record states that the petitioner's principal business is the placement of nurses with client medical facilities. Therefore the majority of the petitioner's employees may be assumed to be earning wages comparable to the proffered wage in the instant petition. Yet the DE 6 reports in the record show few of the petitioner's employees receiving compensation at rates which are near the $52,000.00 annual proffered wage. The DE 6 reports indicate that many of the petitioner's employees worked for only limited periods of time during the reported quarters, since the compensation reported for many employees per quarter is far below the $12,000.00 level which would represent a quarterly portion of the $52,000.000 annual proffered wage.

The following table shows the numbers of employees in various compensation categories, based on information taken from the petitioner's DE 6 reports. The first category in each quarter shows the number of employees who earned at least $13,000.00 that quarter, equivalent to an annual rate of $52,000.00. The other categories show the number of employees receiving quarterly compensation from $10,000.00 to $12,999.99 (annual rates of from $40,000.00 to $51,999.99), from $5,000 to $9,999.99 (annual rates from $20,000.00 to 39,999.99) and less than $5,000 (annual rates less than $20,000.00).

2002	4th Quarter	Total employees receiving compensation	61 employees
		Earned $13,000 or more	10 employees (16.4%)
		Earned $10,000 to $12,999	5 employees (8.2%)
		Earned from $5,000 to $9,999	12 employees (19.7%)
		Earned less than $5,000	34 employees (55.7%)
2003	1st Quarter	Total employees receiving compensation	92 employees
		Earned $13,000 or more	17 employees (18.5%)
		Earned $10,000 to $12,999	6 employees (6.5%)
		Earned from $5,000 to $9,999	15 employees (16.3%)
		Earned less than $5,000	54 employees (58.7%)
2003	2nd Quarter	Total employees receiving compensation	95 employees
		Earned $13,000 or more	20 employees (21.1%)
		Earned $10,000 to $12,999	13 employees (13.7%)
		Earned from $5,000 to $9,999	15 employees (15.8%)
		Earned less than $5,000	47 employees (49.5%)

The above figures show that about 80% of the petitioner's employees received compensation of less than $13,000.00 each quarter, less than the annual rate of the proffered wage of $52,000.00. The figures show that more than 50% of the petitioner's employees received compensation of less than $5,000.00 each quarter, an annual rate of less than $20,000.00. The information on the DE 6 reports shows that in fact many employees received compensation of less than $1,000.00 each quarter, an annual rate of less than $4,000.00. Those figures

strongly suggest that the great majority of the petitioner's employees worked for the petitioner only when their services were needed by one of the petitioner's client medical facilities.

The record in the instant case contains no direct evidence on the intended employment status of the beneficiary with the petitioner during any periods in which beneficiary's services are not requested by any medical facility which is a client of the petitioner. If the intention of the petitioner's management is not to pay the beneficiary during any such periods, such an intention would be inconsistent with the petitioner's offer of employment to the beneficiary as stated on the Form ETA 750. Part 10 of the ETA 750 states that the beneficiary will be employed for 40 hours per week. Moreover, the definition of employment in the Department of Labor regulations states in pertinent part that "[e]mployment means permanent full-time work by an employee for an employer other than oneself." 20 C.F.R. § 656.3. An offer of intermittent employment on an as-needed basis would not satisfy the requirement for an offer of "permanent full-time work."

Given that the appeal will be dismissed for the petitioner's failure to establish its ability to pay the proffered wage, these issues need not be discussed further.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.